No. 85-1384

(9)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER, ET AL., PETITIONERS,

V.

LEONARD SAFLEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Motion for Leave to File Brief and Brief Amicus Curiae in Support of Respondents Submitted by the Plaintiff Inmates in GUAJARDO V. McCOTTER

Harry M. Reasoner
Ann Lents
3000 First City Tower
1001 Fannin
Houston, Texas 77002-6760
713-651-2358

Of Counsel:

Clara L. Meek
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2222

Attorneys for Guajardo Plaintiffs

No. 85-1384

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER, ET AL., PETITIONERS,

V.

LEONARD SAFLEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Motion for Leave to File Brief and Brief Amicus Curiae in Support of Respondents Submitted by the Plaintiff Inmates in GUAJARDO V. McCOTTER

Harry M. Reasoner
Ann Lents
3000 First City Tower
1001 Fannin
Houston, Texas 77002-6760
713-651-2358

Of Counsel:

Clara L. Meek
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2222

Attorneys for Guajardo Plaintiffs

QUESTION PRESENTED

Whether a Missouri prison regulation which prohibits correspondence between inmates who are not members of an immediate family violates the constitutional rights of the inmates.

TABLE OF CONTENTS

No. 85-1384

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER, ET AL., PETITIONERS,

V.

LEONARD SAFLEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Guadalupe Guajardo, Jr., A. L. Lamar, Thomas E. Hill, James E. Baker, Lawrence Pope, and Ronald Kent Franks, class representatives of inmates of the Texas Department of Corrections in *Guajardo v. McCotter*, No. 71-H-570 (S.D. Tex. July 1, 1986) (the "*Guajardo* plaintiffs") hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondents has been obtained. The consent of the attorney for the petitioner was requested but refused. (*See* Appendix.)

The interest of the *Guajardo* plaintiffs in this case arises from the fact that they have been parties to litigation involving inmate correspondence rights in Texas for more than fourteen years. Plaintiffs currently are permitted to correspond with inmates at other prison institutions as a result of two settlement agreements in *Guajardo*.

The State of Texas has filed an *amicus* brief in this case in which it now states that inmate-to-inmate correspondence may be prohibited. It also lodged with this Court parts of the *Guajardo* record purportedly to "illuminate the facts that should inform the Court's legal conclusions" in this case. The record Texas presented is both partial and distorted. The *Guajardo* plaintiffs believe that its *amicus curiae* brief contains a more complete statement of the facts in *Guajardo*.

Wherefore the *Guajardo* plaintiffs respectfully request that they be granted leave to file their Brief Amicus Curiae in Support of Respondents attached hereto.

Respectfully submitted,

Harry M. Reasoner
Ann Lents
Attorneys for *Guajardo* Plaintiffs
3000 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2358

OF COUNSEL:

Clara L. Meek
Vinson & Elkins
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2222

TABLE OF AUTHORITIES

No. 85-1384

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WILLIAM R. TURNER, ET AL., PETITIONERS,

V.

LEONARD SAFLEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS SUBMITTED BY THE PLAINTIFF INMATES IN GUAJARDO v. McCOTTER

INTEREST OF AMICI

Pursuant to Supreme Court Rule 36, Guadalupe Guajardo, Jr., A. L. Lamar, Thomas E. Hill, James E. Baker, Lawrence Pope, and Ronald Kent Franks, class representatives of the inmates of the Texas Department of Corrections in *Guajardo v. McCotter*, No. 71-H-570 (S.D. Tex. July 1, 1986) (final judgment and order approving settlement) ("*Guajardo IV*"), by and through their attorneys, file this brief as *amici curiae* in support of respondents with respect to the correspondence

issue. The *Guajardo* plaintiffs have litigated various issues of inmate correspondence rights, including the right to inmate-to-inmate correspondence, in the Texas Department of Corrections ("TDC") for more than fourteen years. Should this Court retreat from the principles of *Procunier v. Martinez*, 416 U.S. 396 (1974) ("*Martinez*"), there could be serious ramifications for the correspondence rights won in the TDC.

Plaintiffs currently are permitted to correspond with inmates at other prison institutions as a result of two settlements in *Guajardo*. In 1983, the TDC agreed to the issuance of an injunction requiring that, among other things, inmate-to-inmate correspondence be permitted subject to the same, rather extensive, censorship conducted on outside correspondence.[1/]

In October 1985, just over two years after the 1983 settlement had been approved, TDC's director filed a Rule 60(b) motion to modify the correspondence rules, seeking to

---

1/ The class first settled in *Guajardo v. Estelle*, 568 F. Supp. 1354 (S.D. Tex. 1983), *aff'd mem. sub. nom. Franks v. Procunier*, No. 83-2508 (CA5 July 27, 1984) ("*Guajardo III*"), after twelve years of litigation and over three years of monitoring by an independent consultant. Pursuant to the settlement agreement, the TDC adopted and implemented a new set of correspondence rules. The new rules provided for correspondence between prisoners but permitted a restriction on such correspondence where correspondence rights were abused.

See also *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated and remanded sub nom. Sands v. Wainwright*, 491 F.2d 417 (CA5 1973), *cert. denied*, 416 U.S. 992 (1974) ("*Guajardo I*"); *Guajardo v. Estelle*, 432 F. Supp. 1373 (S.D. Tex. 1977) (on remand), *modified*, 580 F.2d 748 (CA5 1978) ("*Guajardo II*").

restrict inmate-to-inmate correspondence drastically.[2/] Again, TDC compromised, deciding that it should accept inmate-to-inmate correspondence unless the inmate is found guilty of a serious violation of the correspondence rules. *See Guajardo IV*.

Now, as indicated in its *amicus* brief, the State of Texas states that it believes the prohibition of such correspondence is justified in spite of its series of decisions to allow the correspondence in its own system. It has filed with this Court its "Texas Lodging" and mischaracterized its own decisions, the record in *Guajardo*, and the Texas system, in an ostensible attempt to "inform" this Court's conclusions. Amicus Brief of State of Texas at 2 n.1 ("Texas Brief"). The *Guajardo* plaintiffs wish to respond to Texas' brief and lodging.

SUMMARY OF ARGUMENT

A ban on inmate-to-inmate correspondence must be justified by a substantial governmental interest and a showing that the means chosen to effectuate the state's purposes are no broader than necessary to protect the state's interest. The right to correspond with other inmates is not inconsistent with an inmate's status as a prisoner, and correspondence is not by nature inherently dangerous, even in the prison context.

State prison officials cannot meet the strict scrutiny standard because there is no credible evidence that inmate correspondence poses a real threat to prison security. The

---

2/ A copy of portions of the transcript of the hearing on that motion along with some of the deposition testimony and exhibits introduced into evidence, has been lodged with the Clerk of the Court. Citations to this lodging are noted as ("L. at _____."). The *Guajardo* plaintiffs offer this lodging in response to the Brief for the State of Texas as Amicus Curiae and the Lodging by the State of Texas.

current move to restrict inmate correspondence rights stems more from the desire to make communication with disfavored groups difficult and an aversion to reviewing inmate mail than from the need to control prison gangs.

ARGUMENT

I. TO RESTRICT INMATE-TO-INMATE CORRESPONDENCE, PRISON OFFICIALS MUST SHOW THAT THE RESTRICTION WILL FURTHER A SUBSTANTIAL GOVERNMENTAL INTEREST AND IS NO BROADER THAN NECESSARY TO PROTECT THAT INTEREST.

"There is no curtain drawn between the Constitution and the prisons of this Country." *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Prison inmates retain those First Amendment rights that are not inconsistent with their status as prisoners or with legitimate penological goals of the corrections system. *Pell v. Procunier*, 417 U.S. 817, 822 (1974) ("*Pell*"). Thus, a restriction on prisoners' right to correspond with other prisoners must be justified by a substantial governmental interest and a showing that the means chosen to effectuate the state's purposes are no broader than necessary to protect that interest. *Martinez*, 416 U.S. at 423. These principles have governed the courts' review of inmate mail censorship since they were enunciated by this Court in 1974. These settled principles, which have governed significant numbers of prison cases, such as *Guajardo*,[3/] should not be abandoned now.

3/ A number of lower courts have applied the *Martinez* test to restraints on inmate correspondence that did not involve the rights of free persons. *See Safley v. Turner*, 777 F.2d 1307 (CA8 1985) (standard not met); *Daigre v. Maggio*, 719 F.2d 1310 (CA5 1983) (*Martinez* satisfied); *Storseth v. Spellman*, 654 F.2d 1349 (CA9 1981) (restriction broader than necessary); *Watts v. Brewer*, 588 F.2d 646 (CA8 1978) (general statement that *Martinez* would apply); *Schlobohm v. U.S. Attorney General*, 479 F. Supp. 401 (M.D. Pa. 1979) (*Martinez* test satisfied); *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio 1978)

(Footnote Continued)

Recent opinions by this Court on the rights of state prison inmates have not departed from this precedent to establish a dual standard for First Amendment rights, with one for inmates and the other for free persons. Thus, the choice between application of the reasonableness test and the strict scrutiny standard does not turn on the identity of the person claiming the First Amendment right.

In *Pell v. Procunier*, decided only a few months after *Martinez*, this Court applied the same analysis to inmates and journalists. Had the Court intended to adopt different standards for inmates and free persons, the dual standard would have been revealed in *Pell*. The Court's application of the reasonableness standard in *Pell* was based on its characterization of the restriction as a time, place, and manner regulation that was content neutral.

In *Jones v. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119, 130 (1977) ("*Jones*"), "First Amendment speech rights [were] barely implicated." Moreover, the activity in which the prisoners sought to engage, solicitation for a prisoners union, was one that was "presumptively dangerous." *Id.* at 133. The Court emphasized that the restriction was narrowly tailored to meet the difficulties posed by the union.

(Footnote Continued)

(regulation more onerous than necessary); *Mayberry v. Robinson*, 427 F. Supp. 297 (M.D. Pa. 1977) (upheld regulation); *Peterson v. Davis*, 415 F. Supp. 198 (E.D. Va. 1976) (upheld prior approval requirement); *Farmer v. Loving*, 392 F. Supp. 27 (W.D. Va. 1975) (ban too broad); *Williams v. Ward*, 404 F. Supp. 170 (S.D.N.Y. 1975) (ban satisfied *Martinez*); *Mitchell v. Carlson*, 404 F. Supp. 1220 (D. Kan. 1975) (*Martinez* applied to censorship of inmate-to-inmate mail).

In applying a reasonableness standard in *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court stressed three points. First, the regulation that prohibited receipt of hard-bound books by pre-trial detainees from any source other than a publisher, a bookclub, or a bookstore, was content neutral and a time, place, and manner restriction. *Id.* at 551-52. Second, since the inmates could receive softcover books and magazines, or use the jail's library, there were alternative means of communication. *Id.* at 552. Third, the restriction worked only a limited deprivation since the pre-trial detainees would be subject to it for a very short period of time. *Id.*

This Court's holding in *Block v. Rutherford*, 468 U.S. 576 (1984), followed the reasoning of *Jones*. In determining that courts should defer to the professional judgment of prison officials, the Court regarded contact visits as a presumptively dangerous activity. Further, and more importantly, only the mode of communication and not its very existence was at issue.

As the Second Circuit recognized in *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1033 (CA2 1985), a reading of those cases suggests a tripartite standard, drawn by reference to the nature of the right being asserted, the type of activity involved, and whether the challenged restriction works a total deprivation or serves merely as a time, place, and manner limitation on the exercise of that right.[4/]

4/ Of the four circuits that have looked at the First Amendment rights of prisoners, only the Fourth Circuit would subscribe to the reasonableness test where a complete ban on communication is involved. *Vester v. Rogers*, 795 F.2d 1179 (CA4 1986). The Second,

(Footnote Continued)

As the Circuit Court below recognized, the ban on inmate-to-inmate correspondence directly implicates First Amendment rights and cannot be characterized as merely a time, place, and manner restriction.[5/] It leaves no alternative means for communication between inmates. *Safley*, 777 F.2d at 1312. To extend the *Jones-Bell-Block* reasonableness standard to such a situation would require overruling *Martinez* and would mark a virtually complete withdrawal from judicial protection of First Amendment rights in a prison context.

To reaffirm that the *Martinez* standard applies is not to suggest that the courts may unduly interfere in prison administration or be insensitive to the difficult problems facing prison administrators. This Court counselled against these errors in *Martinez* itself. *Martinez* merely stands for the

---

(Footnote Continued)

Ninth and Eighth Circuits would hold that such restrictions on inmate correspondence must pass "strict scrutiny." *See Safley v. Turner*, 777 F.2d 1307 (CA8 1985); *Abdul Wali v. Coughlin*, 754 F.2d 1015 (CA2 1985); *Storseth v. Spellman*, 654 F.2d 1349 (CA9 1981).

5/ Inmate-to-inmate correspondence can implicate the right of access to the courts. Absent alternatives, states must allow prisoners to receive assistance from inmate writ writers. *Johnson v. Avery*, 393 U.S. 483 (1969). While the time, place, and manner for rendering such assistance may be reasonably restricted, states cannot deny it altogether. 393 U.S. at 490. Within some state prison systems, such as TDC, inmate-to-inmate mail is very important to the process of giving and receiving inmate writ writer assistance and adequate alternatives to writ writer assistance do not exist. *Ruiz v. Estelle*, 503 F.Supp. at 1367. *See also Corpus v. Estelle*, 551 F.2d 68 (CA5 1977). Nevertheless, TDC often has sought to "severely inhibit communication among inmates about legal matters" and writ writers have been the inmates most frequently singled out for abusive treatment such as officially-induced stabbings, segregation, and unwarranted disciplinary actions. *Ruiz*, 503 F.Supp. at 1300, 1365, 1369 & 1372.

unassailable proposition that when First Amendment rights are clearly implicated by a prison restriction, as in this case, the courts will insist that the restriction be one that serves a legitimate penological goal and that is not overbroad. To require less is to return to unbridled stifling of peaceful dissent and harassment once prevalent in our prisons. *See Martinez*, 416 U.S. at 399-400 (prison officials censored letters that "unduly complain[ed]," "express[ed] inflammatory political, racial, religious or other views or beliefs," or were "otherwise inappropriate"); *Guajardo III*, 580 F.2d at 754, 760-61 (TDC had demonstrated a propensity toward blanket denials of permission to correspond when the would-be correspondent belonged to an "undesirable group," such as prison reform organizations, "left wing" groups, married women, former inmates, known homosexuals and inmates at other institutions; and to suppress material critical of prison administrators).

II. THE COURT SHOULD NOT BE MISLED BY THE STATE OF TEXAS' ATTEMPT TO INTERJECT A PARTIAL AND DISTORTED RECORD INTO THIS CASE.

In arguing for a reasonableness standard, Texas tries to convince the Court that an injustice has somehow been done in Texas due to the *Guajardo* Court's reliance on the *Martinez* test and that inmate-to-inmate correspondence has caused violence in the TDC. Neither is true.

A. Texas Has Repeatedly Belied Its Ostensible Concern with Inmate-to-Inmate Correspondence by Accepting the Obligation to Allow It.

The record Texas uses stems from a Rule 60(b) motion made by O. Lane McCotter, the current director of TDC, seeking to change a judgment entered in *Guajardo* in 1983 as a result of a voluntary settlement of constitutional challenges to

many of TDC's correspondence rules and practices. The 1983 settlement allowed inmate-to-inmate correspondence subject to TDC's right to read all correspondence and to reject objectionable letters. (In fact, inmate-to-inmate correspondence had been permitted in TDC for several years before 1983.) Mr. McCotter, who joined the system after the settlement had been concluded, disagreed with his predecessor's action and sought to virtually end inmate-to-inmate correspondence, alleging that it could not be effectively censored and therefore had led to violence. After extensive discovery and less than two days of the presentation of Mr. McCotter's case, the proceeding was settled by a minor change in the TDC rules to provide that inmate-to-inmate correspondence could be restricted if the inmate committed a serious violation of the correspondence rules. In short, Mr. McCotter, as had his predecessor, apparently decided that inmate-to-inmate correspondence could be adequately handled by screening.

Texas tries to avoid recognition of its choice by implying it was somehow forced to settle by the District Court or the *Martinez* standard or both. In fact, TDC and Mr. McCotter chose to settle freely and voluntarily, and indeed knew *certiorari* had been granted in this case at the time they did so.[6/] Had TDC truly felt that inmate-to-inmate

---

6/ There is nothing in the *Guajardo* record to suggest that either of the two able trial judges who jointly presided over the hearing were hostile to TDC. (Because Mr. McCotter's motion also implicated a previous settlement in *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *modified*, 679 F.2d 1115 (CA5 1982), *cert. denied*, 460 U.S. 1042 (1983), an Eighth Amendment, conditions of confinement case, the motion was tried before both District Courts at Mr. McCotter's

(Footnote Continued)

correspondence posed as great a threat as it now claims, it surely never would have settled *Guajardo* and thereby compromised its central security concerns.

B. Texas' Presentation Distorts the Facts and Is Fundamentally Unreliable.

The record Texas presents in a fundamental sense is unreliable: It has never been subjected to full cross-examination and rebuttal and no fact finding has ever been made on it. Texas' rendition of "the facts" is thus both partial and distorted.

The *Guajardo* hearing was recessed, at TDC's request, after only one and a half days of testimony. As a result, plaintiffs never cross-examined the chief witness Texas now relies on to argue that inmate-to-inmate correspondence is dangerous, Salvador Buentello,[7] or put on their own case at all. Had the record been fully developed, it would show even more clearly that inmate violence within the Texas prison system is caused by inadequate and poorly trained staff, failure

---

(Footnote Continued)

request.) Contrary to Texas' intimation that it became clear during the hearing that TDC would not get any relief from the District Court, portions of the transcript Texas omitted from its presentation show the Court may have been inclined to approve a restriction on mail between gang members. The *Guajardo* Court merely noted that in a Rule 60(b) motion, Mr. McCotter would have to demonstrate "changed circumstances" to obtain a modification of the agreement. It was not hostile to TDC's security concerns.

7/ Texas also lodges Mr. Buentello's deposition testimony about alleged correspondence abuses. That testimony was based entirely upon hearsay and was never tested or indeed admitted in open court. In fact, the incidents Mr. Buentello recounted are shown by TDC's own documents, admitted as plaintiffs' exhibits in *Guajardo*, to have been

(Footnote Continued)

to station guards in housing and recreation areas, a historic policy of ignoring gangs, old and unsafe facilities, and TDC negligence — not by inmate correspondence.

Although a violation of state law, up until 1981, TDC used inmate guards called "building tenders" to compensate for chronic shortages of security personnel. *Ruiz*, 503 F. Supp. at 1294 n.54. Building tenders were allowed to carry weapons and performed most security functions. They served as enforcers of the ranking officers' will and harassed, threatened and physically punished inmates perceived as troublemakers. *Id.* at 1295. The court characterized the building tender system as an abusive, brutal system and ordered its elimination. *Id.* at 1295-98.

When the system was not immediately replaced by a trained civilian guard force, violence escalated,[8] as the TDC had been warned that it would if TDC failed to hire and train a sufficient number of guards to replace building tenders:

(Footnote Continued)

caused by TDC's own unrelated negligence and not by correspondence. TDC's investigators attributed the Evans and Douglas murders to staff negligence. (L. at 2, 6). An independent court monitor in *Ruiz v. Estelle*, 503 F. Supp. 1265, concluded that the Robidoux attack evidenced a "clear lack of adequate supervision during recreation." Twenty-Eighth Monitor's Report of Factual Observations to the Special Master [for *Ruiz v. Estelle*] 67-68 n.78 (1985). (L. at 10). TDC's own report on the Jaquez murder shows that his assailants got the contract to kill him "from initially the streets," not through inmate-to-inmate correspondence. (L. at 11).

8/ S. Ekland-Olson, Judicial Decisions and the Social Order of Prison Violence: Evidence from the Post-Ruiz Years in Texas 23-24 (1985) (unpublished report commissioned by the TDC). (L. at 14-15).

> "Reportedly, Texas has thus far experienced only limited gang influence within its prisons. To whatever extent a "power vacuum" is permitted to exist within the prisons, gangs will probably assert their poisonous influence . . . . Maintaining the capacity to control and manage the prisoners will require numerous changes in operational practice, and perhaps in law . . . . If these things do not occur and prisoners realize they have nothing to fear and nothing to lose, TDC institutions will become unmanageable and very dangerous.[9/]

TDC failed to heed that warning. Until very recently, TDC had a "totally inadequate" system of inmate classification. *Ruiz*, 503 F. Supp. at 1282. Even after developing a classification plan, TDC did not fully implement it.[10/] TDC's staffing patterns have fallen short of minimum security requirements.[11/] TDC has failed to provide adequate supervision during recreation.[12/] It should not be surprising,

---

9/ *Id.* at 24, *quoting* N. Benton & D. Stoughton, Remedial Actions to Reduce Unnecessary Use of Force in the Texas Department of Corrections 4 (1983) (filed as appendix B to Nineteenth Monitor's Report of Factual Observations to the Special Master [for *Ruiz v. Estalle*] (1984)) (L. at 15).

10/ As Mr. McCotter, then Deputy Director of Operations, reported on discovering violations of the classification system on a unit experiencing violence (a situation he called "a mess"): "This probably explains how our last stabbing occurred — and it's only a miracle we haven't had many others!" (L. at 17).

11/ TDC itself concluded that in November 1985, 19 of the 27 units still had staff shortages in housing areas (L. at 20-21), and as of January 1985, 10 of TDC's Units had *no* guards assigned to any housing areas. Report of the Special Master [for *Ruiz v. Estelle*] Concerning the Twenty-Fifth Monitor's Report 5 (1985). (L. at 23).

12/ Twenty-Eighth Monitor's Report of Factual Observations to the Special Master [for *Ruiz v. Estelle*] (1985). (L. at 10).

then, that the Texas prison system has experienced violence, for reasons having nothing to do with correspondence.[13/]

Texas distorts even the partial record by failing to mention significant portions. Most significantly, TDC's own paid expert, Dr. Sherman Day, found the TDC's proposed rule banning inmate-to-inmate correspondence an exaggerated response to the perceived danger. He saw no need to ban all inmate-to-inmate correspondence when all that was needed was some type of restriction on gang members' communication. In his view, the latter was sufficient to deal with TDC's security concerns.

The only recent national study to examine this problem found that inmate correspondence was not a significant factor in the spread of prison gangs and in the increase in prison violence.[14/] In fact, some states reported that inmate correspondence was a valuable intelligence gathering tool that enabled them to identify gang members.[15/] When asked what strategies they employed to combat gangs, no prison agency

---

13/ TDC's rate of violence, at a time when it allowed inmate-to-inmate correspondence, was less than that of the Federal Bureau of Prisons, which banned such correspondence, until 1983, when the effects of ending the brutal building tender system were felt. S. Ekland-Olson, *supra* note 8 at 23-24. (L. at 14-15).

14/ G. Camp & C. Camp, Prison Gangs: Their Extent, Nature and Impact on Prisons (1985) (prepared under grant from the U.S. Dept. of Justice). The study includes data from Texas, as well as most other states.

15/ *Id.* at 70.

cited cutting off correspondence between inmates as a means of controlling gangs.[16/]

Louis M. Dentici, Chief of Internal Affairs of the California Department of Corrections and in charge of gang intelligence, testified by deposition that California's allowance of inmate-to-inmate correspondence without prior approval has not heightened the level of prison gang activity. (L. at 29). Similarly, TDC permitted inmate-to-inmate correspondence for approximately seven years with no complaint or public allegation that it caused any security problems.

Texas argues that inmate-to-inmate mail cannot be monitored effectively. Texas Brief at 11. Yet, TDC has never made even rudimentary efforts to deal responsibly with inmate-to-inmate correspondence. TDC, for example, does not provide any formal training to its mailroom staff on gangs and codes. (L. at 35). It has not developed any guidance materials on how to spot codes.[17/] Despite the fact that about

---

16/ *Id.* at 65-66. Some agencies indicated that enforcement of mail regulations and intercepting communications were among the strategies they used.

17/ In arguing that inmate-to-inmate mail cannot be monitored, Texas relies heavily on the testimony of Robert Humphries, a TDC inmate in protective custody who admitted he was dependent on TDC's good graces for his very life. (Texas Lodging at 53.) Humphries admitted that the code he referred to had never been used in real life, but was concocted for the TDC's use. (Texas Lodging at 40). Humphries also admitted that the rules and guidelines of his former gang directed gang members to send important messages by hand delivery, not through the mail, presumably because of the risk of detection through mail censorship. (Texas Lodging at 76). In addition, Humphries testified that if TDC wanted to learn what codes were being used all it had to do was "just stand down in the cell block" and listen to the codes being called off by the inmates. (Texas Lodging at 65-66).

a third of its inmate population is Spanish-speaking, fourteen of its twenty-seven prison units had no Spanish-speaking mailroom staff as of December 1985. (L. at 38). Further, a 1985 survey of TDC unit mailrooms showed that TDC could review all inmate-to-inmate correspondence with a modest increase in civilian, or non-corrections officer, staff. (L. at 40).[18/]

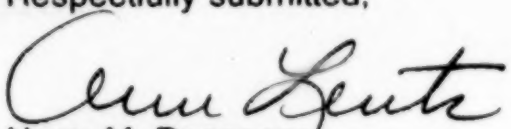
The entire record in *Guajardo* clearly suggests that a ban on inmate-to-inmate correspondence is at best a much exaggerated response to security concerns, as Texas evidently concluded when it decided that it should instead adopt a rule merely precluding such correspondence by inmates who had committed a serious violation of the mail rules. The *Guajardo* plaintiffs respectfully suggest that this Court should not be swayed by Texas' distorted lodging but by the indisputable fact of its actions.

18/ Its reliance on a two-week survey of inmate-to-inmate mail within TDC to show the volume of such correspondence is misplaced. First, it neglected to point out that the true volume of such correspondence is about one-half the total figure shown, since each piece was counted at both the sending and receiving units. (L. at 36-37). Second, the admittedly unscientific study encompassed Valentine's Day, with its increased mail volume. Third, fully 40 percent of the inmate-to-inmate correspondence within TDC is to and from the two women's units, where TDC admits there are no gangs and very little violence.

CONCLUSION

For all of the above reasons, this Court is respectfully requested to affirm the decision of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



Harry M. Reasoner
Ann Lents
Attorneys for *Guajardo* Plaintiffs
3000 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2358

OF COUNSEL:

Clara L. Meek
VINSON & ELKINS
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
(713) 651-2222

APPENDIX

ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

August 27, 1986

Ms. Ann Lents
Vincent & Elkins
3300 First City Tower
101 Fanin
Houston, TX 77002-7660

Re: Turner et al. v. Safley, Supreme Court File 85-1384

Dear Ms. Lents:

I have received your request to write an amicus curiae brief in opposition to the brief filed by Texas. Frankly, I do not believe that the Supreme Court is an appropriate forum for you and your adversaries in the Attorney General's Office in Texas to litigate the truthfulness of a transcript. With that in mind, I will not consent to the filing of a brief in opposition to Texas' brief.

Sincerely,

WILLIAM L. WEBSTER
Attorney General

HENRY T. HERSCHEL
Assistant Attorney General

HTH:ds
cc: Service List

BLACKWELL SANDERS MATHENY WEARY & LOMBARDI

FIVE CROWN CENTER
2480 PERSHING ROAD
KANSAS CITY, MISSOURI 64108
816 474-5700

TELECOPIER
816 474-9031

4/ CORPORATE WOODS, SUITE 210
9401 INDIAN CREEK PARKWAY
P. O. BOX 25388
OVERLAND PARK, KANSAS 66225-5388
913 345-8400

AUG 25 1986

August 21, 1986

Ms. Ann Lents
Vinson & Elkins
3300 First City Tower
1001 Fannin
Houston, Texas 77002-6760

Re: Turner, et al. v. Safley, et al.
C.A.: 85-1387
Our File: 5132

Dear Ms. Lents:

This is to inform you that Respondents in the above-referenced case hereby consent to the filing of an amicus curiae brief in this case on behalf of the inmate class in Guajardo v. McCotter.

Very truly yours,

Floyd R. Finch, Jr.

Floyd R. Finch, Jr.

FRF,Jr./rmg

cc: William L. Webster
Henry T. Herschel